(11)

No. 94-1471

In The

Supreme Court of the United States

October Term, 1995

VARITY CORPORATION,

Petitioner,

v.

CHARLES HOWE, ROBERT WELLS, RALPH W. THOMPSON, PATRICK MOUSEL, on Behalf of Themselves and as Representatives of a Class of Persons Similarly Situated, JOHN ALTOMARE, CHARLES BARRON, ALEXANDER CHARRON, CHARLOTTE CHILES, ANITA CROWE, RAY DARR, DORIS GUIDICESSI, BARNETT LUCAS, ROBERT SKROMME, and the Estate of WALTER SMITH, individually,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF RESPONDENTS

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QUESTIONS PRESENTED

1. Does the Employee Retirement Income Security Act ("ERISA") § 502(a)(3), 29 U.S.C. § 1132(a)(3) (1988), permit individual ERISA plan participants and beneficiaries to recover on their own behalf for breaches of fiduciary duty under ERISA?

2. Does ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1) (1988 & Supp. 1993), impose a duty upon plan fiduciaries not to make affirmative misrepresentations to plan participants and beneficiaries?

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BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

This case is about ERISA fiduciaries who carried out a fraudulent scheme to rid themselves of welfare benefit obligations to employees and retirees by transferring those obligations to a sham corporation which was essentially bankrupt from the outset. (See Appendix to Petition for a Writ of Certiorari, hereinafter referred to as "PA", 55a ¶ 24.) In so doing, the fiduciaries breached their most

fundamental duty to their plan participants – the duty of honesty. This case, in short, is about whether ERISA fiduciaries can lie to plan participants and get away with it.

Respondents are former employees of petitioner[1] who participated in the Massey Ferguson, Inc. employee benefit plan (the "MF plan"). The MF plan is an "employee welfare benefit plan" within the meaning of § 3(1) of ERISA, 29 U.S.C. § 1002(1) (1988). It includes benefits for life insurance, medical, vision, hearing, and dental care. (PA 51a, ¶ 2.) Respondents include a class of 83 plaintiffs who were active employees of petitioner and who were fraudulently induced to consent to the transfer – and resulting loss – of their employment and benefit rights to the sham corporation, Massey Combines Corporation ("MCC"). Those respondents were identified in this litigation as the "Retired Class" because they retired from MCC before its demise. Respondents also include 10 individual plaintiffs who already had retired from employment with petitioner at the time of the creation of MCC. Petitioner unilaterally purported to transfer to MCC its obligation to pay welfare benefits to the 10 individual respondents.[2]

[1] Massey Ferguson, Inc. and its parent corporation, Varity Corp., were separately named as defendants in this action. Because Massey Ferguson, Inc. has subsequently merged into Varity Corp., the defendants will collectively be referred to herein as "petitioner," except where necessary to provide context to the factual findings. In such instances, Varity Corp. will be referred to as "Varity" and Massey Ferguson, Inc. will be referred to as "MF."

[2] This litigation also originally included claims by another class of plaintiffs identified as the "Terminated Class," who

Petitioner's statement of the case focuses largely on matters other than the central issue of its fraudulent conduct, and at times also implies that at this stage of the proceedings there is some dispute about the finding that a fraud was committed. However, in the court of appeals petitioner did not challenge any of the district court's findings of fact, which the court of appeals appropriately characterized as "comprehensive and painstaking." (PA 7a.) The facts as found by the district court (PA 50a-80a) are, therefore, not in dispute. The findings of fact powerfully document petitioner's fraudulent scheme, and need only be briefly highlighted here.

The fraudulent scheme, cynically dubbed "Project Sunshine," was developed by petitioner in 1985. It was designed to improve petitioner's financial health by spinning off to the newly-formed MCC most of petitioner's Combines and Related Equipment ("CARE") division, as well as other unprofitable assets which were not part of the CARE division, and by transferring to MCC a huge amount of corporate debt. One of the primary objectives of Project Sunshine was to rid petitioner of the obligation to pay benefits to employees and retirees. (PA 54a, ¶ 17; 65a, ¶ 69.)

transferred from petitioner to MCC and were still employed by MCC at the time of its demise. The claims of the Terminated Class are not at issue in this certiorari proceeding. The claims of a group of disabled plaintiffs were settled before trial and also are not at issue here.

MCC assumed $282.4 million (Canadian) of long-term debt from petitioner. It did so for inadequate consideration. (PA 57a, ¶ 29.) Those segments of the CARE division which were not profitable were transferred to MCC; the lucrative ones were not. For example, petitioner retained the very profitable parts business. (PA 58a, ¶ 33.) Similarly, petitioner retained real estate valued in the millions of dollars which had been part of the CARE division. (PA 58a, ¶ 34.) The only products to be manufactured by MCC which could be sold for a profit were balers, but a part of Project Sunshine required MCC to sell the balers exclusively to petitioner which, in turn, sold them for a profit. (PA 52a-53a, ¶ 11.) On the other hand, petitioner's retail stores, which historically had not been a part of the CARE division, but which were losing approximately $6 million per year, were transferred to MCC. (PA 57a, ¶ 31.)

When it was formed on May 9, 1986, MCC had on its books $54 million in losses (although it had never been in operation) and only $15,000 in cash. Inventory, receivables and other assets transferred to MCC were overvalued while liabilities and costs were understated. The company had a negative net worth on the day it was formed, with liabilities exceeding assets by at least $46 million. (PA 55a-56a, ¶ 24.)

The essence of MCC's business plan was the liquidation of assets. (PA 56a, ¶ 25.) The executive designated to preside over MCC's inevitable demise was Ivan Porter, who had been employed by petitioner for many years, including as President of the CARE division. Porter was assigned to MCC as its President and CEO with the understanding that he would return to petitioner after

two years. Unbeknownst to any other MCC employee, Porter actually remained an employee of petitioner while working with MCC. (PA 54a, ¶ 20.) During the first months of MCC's existence, Porter and other MCC executives openly discussed among themselves the fact that MCC could not survive; the expression they used was "that dog won't hunt." (PA 56a, ¶ 26.)

It was essential to the "success" of Project Sunshine that the existing employees of the CARE division and of the retail stores (including the members of the Retired Class) be persuaded to accept the transfer of their employment and benefit rights to MCC. The transfer served two purposes: first, it helped achieve petitioner's objective of divesting itself of employee benefit obligations; second, it was necessary for MCC to have employees in order to make it appear to be a viable entity into which petitioner could unload its corporate debt.

The existing employees' consent to the transfer was solicited through a letter from Ivan Porter (see Joint Appendix, hereinafter referred to as "JA", 81-83) which was sent to non-retail store employees and through an identical letter under another executive's signature sent to retail store employees. (PA 62a, ¶¶ 58-59.) These letters were accompanied by an acceptance form (JA 83), a transcript of a videotaped message from Porter (JA 78-80), a side-by-side comparison of MF and MCC employee benefit plans (JA 67-73), and a question and answer sheet (JA 74-77). (PA 62a, ¶ 60.) The acceptance form encouraged employees to sign and return it promptly "to ensure uninterrupted continuation of your pay and benefits." (JA 83.)

Petitioner also arranged meetings at various sites to solicit employees' acceptance of the transfer to MCC. The only meeting site for the employees who are members of the Retired Class was MF's corporate headquarters in Des Moines, Iowa. All available employees met in a large meeting room where the Porter videotape was shown, followed by distribution of the letter soliciting the employees' consent to the transfer. Petitioner directed that the tone of the meeting be "as light, upbeat and positive as possible." Petitioner wanted to "encourage, all salaried employees to sign the acceptance . . . and to leave [the acceptance form at the meeting]." (PA 62a-63a, ¶ 61.)

The information given to the employees portrayed a positive economic outlook for MCC. For example, the Porter letter stated:

> When you accept employment with Massey Combines Corporation . . . benefit programs will remain unchanged.
>
> * * *
>
> We are all very optimistic that our new company has a bright future . . .

(JA 82.) The Porter videotape transcript stated:

> When you transfer your employment to Massey Combines Corporation, . . . benefit programs will remain unchanged.
>
> * * *
>
> . . . we are doing many other exciting things designed to improve the profitability . . . of the business.

> * * *
>
> This financial restructuring created Massey Combines Corporation and will provide the funds necessary to ensure its future viability.
>
> * * *
>
> Finally, despite the depression which persists in the North American economy, I am excited about the future of Massey Combines Corporation. Together we can exploit all available opportunities in the combines business. I look forward to working with you in the future to ensure the success of Massey Combines Corporation.

(JA 80; PA 63a-64a, ¶ 63.)

The question and answer sheet distributed with the Porter letter contained eight questions and answers. Petitioner developed these questions and answers in anticipation of the "many concerns" of the employees, but petitioner purposely made the questions and answers incomplete, confusing, evasive and deceptive. (PA 64a, ¶ 64.) Petitioner did not include in the question and answer sheets certain questions it knew the employees wanted answered. For example, the employees wanted to know whether they were eligible for a termination pay benefit from MF. The employees also wanted to know if they could take early retirement from MF rather than transfer to MCC. Petitioner purposely did not provide answers to these and other questions because it wanted the employees to transfer to MCC in order to avoid the liabilities associated with severance pay and retirement benefits. The district court found that petitioner's failure to make those disclosures, in conjunction with its other

affirmative misrepresentations, was to the detriment of the Retired Class. (PA 64a-65a, ¶ 66.)

Only limited information was provided with the Porter letter concerning employee benefits. That information included a side-by-side comparison showing that MF's and MCC's benefits were identical. The question and answer sheet stated that "benefit programs will remain unchanged." (JA 75.) Petitioner considered telling the employees that "initially" benefits would remain the same but that MCC would be reviewing the benefits and would notify the employees of any changes. Petitioner rejected this disclosure because it believed it would cause the employees to reject the acceptance forms. Soon after the employees transferred to MCC, petitioner began to develop "creative and innovative ways" to reduce employee benefits. (PA 64a, ¶ 65.)

The district court also found that petitioner knew that it should tell the employees that it claimed the right to amend or terminate benefits even after retirement. Petitioner's internal communications showed that the Canadian government and petitioner's lenders insisted that "in communicating with employees in the formation of MCC, that we are very explicit about maintaining our rights to modify benefits in the future, i.e., that there is no promise that the present benefits will be guaranteed forever. As a result, we are faced with the awkward situation that the letter may not attract those employees who we would like to join MCC." Petitioner ultimately decided to ignore the advice of the Canadian government and its lenders and did not make the suggested disclosure to its employees. (PA 65a, ¶ 67.)

The district court found that "communications to employees of MF were laced with fraudulent misrepresentations in order to get them to sign acceptances of employment." (PA 89a.) The court found that petitioner's representations "regarding the potential financial viability of MCC, MCC's business outlook, and the employee benefits were materially misleading." It found that petitioner "knew the representations were materially misleading when made" and that "plaintiffs relied on these representations to their detriment." (PA 65a, ¶ 68.)

The members of the Retired Class, along with other CARE division and retail store employees, did sign the forms accepting the transfer of their employment and benefit rights to MCC.

In addition to the transfer of existing employees and their benefit rights, another essential feature of Project Sunshine was the transfer to MCC of petitioner's obligation to provide welfare benefits to approximately 4,000 of petitioner's former employees who were already retired at the time of MCC's formation (PA 57a, ¶ 30.); these included the 10 individual respondents in this action.[3]

None of the individual respondents authorized the transfer of the obligation to pay their welfare benefits from petitioner to MCC. Petitioner did not even attempt to persuade the individual respondents to consent to the transfer; rather, petitioner unilaterally assigned to MCC

[3] Almost all of the 4,000 retirees were former Canadian employees whose claims against petitioner after MCC's demise were settled in a separate action under Canadian law.

the obligation to pay benefits to the individual respondents (along with other MF retirees). The individual respondents were not even aware that this had occurred until the receivership of MCC, whereupon they learned of the transfer only because they stopped receiving benefits. (PA 51a-52a, ¶ 7; PA 65a, ¶ 70.)

Based on the unchallenged testimony of another industry executive, the district court found that Varity's Chairman and CEO, Victor Rice, bragged to his peers that he had "unloaded his losers all in one wagon" through Project Sunshine. The executive testified that Rice said he was "putting his big product losers, combines and four-wheel drives in [MCC]. He told us he was putting his big losers, company stores in [MCC] and told us he was shifting several thousand retirees and their pension obligations into [MCC] and was delighted to be out from under all those obligations." The executive also quoted Rice as stating that "he got the lenders to agree to shove about $200 million worth of debt over into [MCC] off of [Varity]." (PA 56a-57a, ¶ 28.)

As anticipated, MCC's business failed. It lost $88 million in its first year, and its losses continued to mount until it went into receivership (bankruptcy) in Canada on March 4, 1988. Like the MF plan (which MCC had simply adopted as its own), the MCC plan was self-funded (PA 51a, ¶ 3); as a result of the receivership, respondents stopped receiving their welfare benefits.

The district court found that petitioner's fraudulent conduct in connection with the transfer of respondents' benefit rights was "willful, wanton, malicious and in bad faith viś-a-viś all plaintiffs." (PA 78a, ¶ 110.)

The district court found that both MF and Varity were fiduciaries to the MF plan. MF's board of directors was the "named fiduciary" of the plan within the meaning of § 3(21)(A) of ERISA, 29 U.S.C. § 1002(21)(A) (1988), and MF itself was the plan administrator. (PA 78a, ¶ 111.) The district court found that Varity was a fiduciary with respect to the MF plan because Varity at all times controlled MF. (PA 79a, ¶ 112.) The court also found that Varity and MF were both fiduciaries to the MCC plan to the extent it had any existence apart from the MF plan. (PA 79a, ¶ 113.)

Based on evidence detailed in the findings and conclusions (see PA 80a-89a), the district court also concluded that petitioner was the alter ego of MCC – that MCC was never an independent legal entity separate and apart from petitioner, which designed, created and controlled every aspect of MCC throughout its existence. (PA 62a, ¶ 57.) The court found, in short, that "MCC was a sham from the start." (PA 89a.)

The district court found, and the court of appeals affirmed, that petitioner breached its ERISA fiduciary duties to the Retired Class through fraudulent misrepresentations made to induce them to accept the transfer of their benefit rights to MCC.[4] In addition, petitioner breached its fiduciary duty to the individual respondents by purporting unilaterally to transfer their benefit rights

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[4] While the district court found and the court of appeals affirmed that petitioner was guilty of fraudulent misrepresentations, both courts concluded that respondents' separate cause of action for fraud, as such, was preempted by ERISA. (PA 11a.)

from the MF plan to the MCC plan without their knowledge or consent, and without any authority to do so in the plan documents. The remedy for these breaches, as modified by the court of appeals, was an injunction requiring petitioner to reinstate respondents to the MF plan, together with an award of restitution for benefits which should have been paid from the time of the fraudulent transfer through the date of reinstatement.[5]

In upholding respondents' recovery for breach of fiduciary duty, the court of appeals gave effect to the plain language of § 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3) (1988), authorizing actions by participants or beneficiaries to redress violations of Subchapter I of ERISA, which includes the provision defining the duties

[5] The form of equitable relief granted for petitioner's breach of fiduciary duty is not among the questions presented in this certiorari proceeding. The Chamber of Commerce as *amicus* attempts to raise the issue of whether the award of restitution for past benefits constitutes "appropriate equitable relief" under § 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3) (1988). In accordance with Supreme Court Rule 24.1(a), that issue is not properly before the Court and is therefore not addressed in respondents' argument. However, as the court of appeals noted, this Court in *Mertens v. Hewitt Associates*, 113 S. Ct. 2063 (1993), twice listed restitution as a type of equitable relief available under § 502(a)(3). (PA 19a; *see* 113 S. Ct. at 2068, 2072.) The Court has also stated that a monetary award can properly be characterized as "equitable" relief when (as in this case) it is "incidental to or intertwined with injunctive relief." *Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry*, 494 U.S. 558, 571 (1990) (quoting *Tull v. United States*, 481 U.S. 412, 424 (1987)). *See also, In Re: Unisys Corp. Retiree Medical Benefit "ERISA" Litigation*, No. 94-1875, 1995 WL 380983, at *9 (3d Cir. June 28, 1995) (relief including "restitutionary reimbursement for back benefits" was equitable in nature and therefore appropriate under § 502(a)(3)).

of an ERISA fiduciary. Contrary to petitioner's assertion, the court of appeals was not "silent" as to why petitioner's conduct in connection with Project Sunshine represented more than a mere business decision and was actionable as a breach of fiduciary duty. The court of appeals explained that, in the case of the Retired Class, petitioner's conduct was actionable because it involved intentionally misleading communications to plan participants regarding plan administration. (PA 12a-13a.) The court of appeals held that "lying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in § 404(a)(1) of ERISA, 29 U.S.C. § 1104(a)(1)." (PA 12a, quoting *Peoria Union Stock Yards Co. v. Penn Mutual Life Insurance Co.*, 698 F.2d 320, 326 (7th Cir. 1983).)

With respect to the individual respondents, the court of appeals explained that petitioner's conduct in purporting unilaterally to transfer their benefit rights to MCC without their knowledge or consent represented a "complete disregard of the rights and interests of beneficiaries" and a "clear breach of fiduciary duty in violation of § [404(a)(1)]." (PA 17a.) Notably, petitioner does not appear to dispute the court of appeals' conclusion that its conduct as to the individual respondents constituted a breach of fiduciary duty.

Much of petitioner's statement of the case is devoted to a discussion of the record and procedural history relating to a claim which is not at issue in this certiorari proceeding.[6] In addition to their claim for breach of

[6] It is also noteworthy that much of petitioner's statement of the case often is supported not by references to the findings of

fiduciary duty under § 502(a)(3), respondents also contended below that they were entitled to vested lifetime benefits under the MF plan pursuant to § 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B) (1988). The claim for lifetime benefits was based on the fact that the summary plan description ("SPD") entitled "You and Massey Ferguson" did not disclose that petitioner reserved the right to amend or terminate the plan, while other representations made to respondents both in the SPD and elsewhere led respondents to believe that their benefits vested upon retirement and could not thereafter be reduced or terminated.

The district court rejected the claim for lifetime benefits under § 502(a)(1)(B) based on the finding that petitioner's reservation of the right to amend or terminate as set forth in the plan was enforceable. The court of appeals affirmed, holding that the language of the reservation of rights provision unambiguously conferred upon petitioner the right to amend or terminate the plan, and therefore was fatal to respondents' claim that "once they had retired from MF, their right to welfare benefits became vested for life." (PA 9a.) Thus, the only issue addressed in the context of the § 502(a)(1)(B) claim was

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fact but by citations to evidentiary material. One of the more significant examples of this is petitioner's citation to testimony suggesting that the only alternative to Project Sunshine was to close the CARE division and terminate plaintiffs' employment. (See petitioner's brief at 6, n. 7.) However, the district court made no finding of fact to that effect. Petitioner itself represented to employees only that it was "uncertain" whether MF could offer employment prospects comparable to those available at MCC. (JA 75.)

whether respondents were entitled to lifetime benefits. That claim was rejected, but respondents nevertheless established through their claim for breach of fiduciary duty their entitlement to reinstatement to the MF plan as it now exists, with such rights as appertain generally to members of the plan. (PA 23a.)

Petitioner's focus upon the dispute over the enforceability of its reservation of the right to amend or terminate the plan is thus misplaced. It is undisputed that the MF plan to which respondents are to be reinstated still exists and has never been terminated (PA 51a, ¶ 2), and petitioner's right to modify the plan still exists. (PA 23a.)

SUMMARY OF ARGUMENT

The existence of a right of individual recovery for breach of fiduciary duty is apparent from the plain language of § 502(a)(3), which authorizes participants or beneficiaries to bring actions to "redress . . . violations" or "to enforce *any* provisions" (emphasis added) of subchapter I of ERISA. Subchapter I includes § 404(a)(1) of ERISA, 29 U.S.C. § 1104(a)(1) (1988 & Supp. 1993), the provision which sets forth the duties of an ERISA fiduciary. If Congress had not intended § 404(a)(1) to be actionable through § 502(a)(3), then in the exercise of the deliberate care with which it drafted ERISA's remedial provisions, it would have excepted § 404(a)(1) from the language of § 502(a)(3).

This construction of § 502(a)(3) in accordance with its plain meaning is supported by the fundamental purpose of ERISA and by the common law of trusts, to which

ERISA traces its roots. The purpose of ERISA is to "promote the interests of participants and their beneficiaries in employee benefit plans." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 113 (1989) (quoting *Shaw v. Delta Airlines*, 463 U.S. 85, 90 (1983)). Under the common law of trusts, the duties of a trustee run directly to trust beneficiaries, and the right of individual recovery for breach of trust is recognized.

The legislative history of ERISA does not support petitioner's argument that § 409 of ERISA, 29 U.S.C. § 1109 (1988), as made actionable through § 502(a)(2) of ERISA, 29 U.S.C. § 1132(a)(2) (1988), was intended to represent the exclusive source of a remedy for breach of a fiduciary duty. Petitioner and its *amici* argue, in effect, that although fiduciaries have a duty to act "solely in the interest of participants and beneficiaries," a breach of that duty which injures only individual beneficiaries, as opposed to the plan itself, should not be remediable. That Congress did not intend such a result is evident from the plain language of § 502(a)(3).

Petitioner breached its fiduciary duty to the Retired Class by making intentional, affirmative misrepresentations about the status and security of their benefits in connection with the solicitation of their consent to the transfer to MCC. Petitioner was not merely silent, but exercised its discretion to communicate with the Retired Class about these matters. Accordingly, this is not a case about whether there is a duty to disclose but rather about whether there is a duty not to lie. There can be no legitimate dispute that the duties of loyalty and prudence imposed upon ERISA fiduciaries encompass a duty not to lie to participants about the status of their benefits, which

in turn includes a duty not to make affirmative representations which are misleading because they are incomplete.

In making these misrepresentations, petitioner was acting in its fiduciary capacity as plan administrator because the misrepresentations related to benefits. The structure of ERISA and the nature of the position of plan administrator reflect that the act of communicating with participants about benefits is an inherently fiduciary function. The communications mandated by ERISA's reporting and disclosure scheme are not the only fiduciary communications contemplated by Congress. The SPD, "You and Massey Ferguson," also demonstrates that petitioner itself contemplated and invited additional, discretionary communications between participants and petitioner in its fiduciary capacity as plan administrator.

Petitioner's argument based on its disclosure of a right to amend or terminate the MF plan is inapposite because petitioner did not exercise any such right in connection with Project Sunshine. The MF plan still exists and has never been amended so as to eliminate benefits. Moreover, the court of appeals' decision does not undermine the distinction between pension plans and welfare plans with regard to vesting. Respondents have not been reinstated to vested benefits.

Finally, petitioner's argument that its misrepresentations to the Retired Class did not constitute a breach of fiduciary duty does not appear to challenge the court of appeals' ruling that petitioner breached its fiduciary duty to the individual respondents by purporting unilaterally to transfer to MCC petitioner's obligation to pay benefits

to the individual respondents. This act represented a breach of fiduciary duty because, among other reasons, the terms of the plan made no provision for such a transfer. Petitioner thus breached its fiduciary duty to administer the plan in accordance with the governing instruments.

ARGUMENT

I. PARTICIPANTS AND BENEFICIARIES HAVE A RIGHT OF INDIVIDUAL RECOVERY FOR BREACH OF FIDUCIARY DUTY UNDER THE PLAIN LANGUAGE OF § 502(a)(3).

Section 502(a)(3) of ERISA provides in pertinent part as follows:

> [A] civil action may be brought . . . by a participant [or] beneficiary . . . to enjoin any act or practice which violates any provision of this subchapter . . . or . . . to obtain other appropriate equitable relief . . . to redress such violations or . . . to enforce any provisions of this subchapter. . . .

Section 404(a)(1) of ERISA, which sets forth the duties of a fiduciary, is a part of subchapter I of ERISA to which § 502(a)(3) refers. Thus, under the plain meaning of § 502(a)(3), a participant or beneficiary has a right of action to redress a fiduciary's violation of § 404(a)(1). Nothing in § 502(a)(3) prohibits such a participant or beneficiary from obtaining relief in his or her individual capacity.

Neither petitioner nor its *amici* appear to seriously dispute that the plain language of § 502(a)(3) supports respondents' right of individual recovery for breach of fiduciary duty. Giving effect to the plain meaning of a statute is, of course, the first principle of statutory construction. A court must "begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *FMC Corp. v. Holliday*, 498 U.S. 52, 57 (1990) (quoting *Park 'N Fly, Inc. v. Dollar Park 'N Fly, Inc.*, 469 U.S. 189, 194 (1985)). A court should always turn to this "cardinal canon" of statutory construction before all others; "[w]hen the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.' " *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54 (1992), (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)). Thus, a party seeking to defeat the plain meaning of a statute bears an "exceptionally heavy burden." *Patterson v. Shumate*, 504 U.S. 753, 760 (1992).

The court of appeals' construction of § 502(a)(3) was guided by this fundamental principle ("the plain language of the statute certainly favors [respondents'] position" – PA 14a-15a). *Accord, In Re: Unisys Corp. Retiree Medical Benefit "ERISA" Litigation*, No. 94-1875, 1995 WL 380983, at *8-*9 (3d Cir. June 28, 1995); *Anweiler v. American Electric Power Service Corp.*, 3 F.3d 986, 992-93(7th Cir. 1993).

No majority of this Court has yet had occasion to consider the question at hand. In *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985), upon which many of the arguments of petitioner and its *amici*

are founded, the plaintiff expressly disclaimed reliance on § 502(a)(3); accordingly, the majority had "no occasion to consider" whether that section authorized individual relief for breach of fiduciary duty. *Russell*, 473 U.S. at 139 n. 5. However, three justices joined with Justice Brennan in a concurring opinion indicating that § 502(a)(3) should be construed as authorizing actions by individual participants and beneficiaries for breach of fiduciary duty under § 404(a). The concurrence stated that:

> Section 502(a)(3) authorizes the award of "appropriate equitable relief" directly to a participant or beneficiary to "redress" *any* act or practice which violates *any* provision of this title or the terms of the plan. This section and section 404(a)'s fiduciary-duty standard both appear in Title I, which is entitled "PROTECTION OF EMPLOYEE BENEFIT RIGHTS." A beneficiary therefore may obtain "appropriate equitable relief" whenever an administrator breaches the fiduciary duty set forth in section 404(a).

473 U.S. at 153-54 (emphasis in original).[7]

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[7] More recently, in *Mertens v. Hewitt Associates*, 113 S. Ct. 2063 (1993), four justices joined in a dissenting opinion which also dealt with the question of whether a breach of fiduciary duty would be actionable under § 502(a)(3), although it had not been addressed by the parties and therefore was not the subject of the majority's holding. At footnote 1, the *Mertens* dissent wrote in pertinent part as follows:

> Section 502(a)(3) gives a cause of action to any participant, beneficiary or fiduciary of an ERISA-governed plan "to redress . . . violations" of the statute. There can be no dispute that when an ERISA fiduciary breaches his or her duty of care in managing the plan, there has been a violation of the statute. *See* 29 U.S.C. § 1104. The only question then is whether the remedies provided by § 502(a)(3) "to redress such [a] violatio[n]" must stop with the breaching fiduciary . . .

Mertens, 113 S. Ct. at 2073 n. 1 (Stevens, J., dissenting).

The fact that Congress chose to make the violation of *any* provision of subchapter I (which includes § 404(a)(1)) actionable through § 502(a)(3) strikes at the heart of one of the principal statutory construction arguments of petitioner and its *amici*. They note, as has the Court, that ERISA's remedial scheme was crafted with "deliberate care." *See Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 54 (1987); *Russell, supra*, 473 U.S. at 174. That premise, however, can only lead to a conclusion directly opposite to that for which petitioner and its *amici* advance it. If in the exercise of such deliberate care Congress had intended that § 502(a)(3) should not be accorded its plain meaning – which would allow individual beneficiaries to obtain redress for breach of fiduciary duty – it could easily have excepted § 404(a)(1) from "the provisions of this subchapter," violations of *any* of which were made actionable by the language Congress did select. The fact that Congress exercised deliberate care in drafting the statute, and in so doing elected *not* to make such an exception, compels that it be construed in accordance with its plain meaning.

This plain language interpretation of § 502(a)(3) is further supported by the fundamental purpose of ERISA and the common law of trusts, to which ERISA traces its roots. The Court has noted that "ERISA was enacted 'to promote the interests of employees and their beneficiaries in employee benefit plans.' " *Firestone Tire & Rubber Co. v.*

Bruch, 489 U.S. 101, 113 (1989) (quoting *Shaw v. Delta Airlines*, 463 U.S. 85, 90 (1983)). *See* § 2(b) of ERISA, 29 U.S.C. § 1001(b) (1988) ("It is hereby declared to be the policy of this chapter to protect . . . the interests of participants in employee benefit plans and their beneficiaries . . . by establishing standards of conduct, responsibility, and obligations for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts").

The Court also has repeatedly observed that ERISA – and its fiduciary responsibility provisions in particular – are rooted in the common law of trusts. *Firestone, supra*, 489 U.S. at 110-11; *Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 570-72 (1985). The Court is therefore guided by principles of trust law in construing the statute. *Id.* As Justice Brennan noted in his concurrence in *Russell*, "it is black letter trust law that fiduciaries owe strict duties running directly to beneficiaries" in the administration of trusts. *Russell, supra*, 473 U.S. at 152-53 (citing *Restatement (Second) of Trusts* § 182 (1959) and G. Bogert and G. Bogert, *Law of Trusts* § 109 (1973)).[8] *See also, Restatement (Second) of Trusts* §§ 170 ("duty of loyalty"), 173 ("duty to furnish information"), and 174 ("duty to exercise reasonable care and skill"), all defining the duties of a trustee as being owed "to the beneficiary."

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[8] The incorporation of this common law principle into ERISA is reflected not only in § 502(a)(3) but also in § 404(a)(1), which requires every fiduciary to discharge its duties "solely in the interest of participants and beneficiaries." *See also, Central States, supra*, 472 U.S. at 576 ("A trustee's duty extends to all participants and beneficiaries of a . . . plan").

The right of beneficiaries to obtain individual recovery for breach of fiduciary duty under appropriate circumstances thus was established at common law. *See Restatement (Second) of Trusts* § 197, *et seq.* (1959); *see, e.g., United States v. Mitchell*, 463 U.S. 206, 225-27 (1983). Because ERISA traces its roots to the common law of trusts, and because it is the purpose and expressly declared policy of ERISA to protect the interests of participants and beneficiaries in employee benefit plans, the Court has recognized that it would be anomalous to construe ERISA in a way that "would afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted." *Firestone, supra*, 489 U.S. at 114. *See also, Mertens, supra*, 113 S. Ct. at 2072 (Stevens, J., dissenting).

Petitioner does not dispute the relevance of the common law of trusts to the interpretation of ERISA. It argues instead that neither the law of trusts nor ERISA's fundamental purpose to protect the rights of beneficiaries can be used to "modify" the relief available under the statute. However, respondents do not resort to the common law of trusts or to the declared purpose of ERISA to "overcome the words of [ERISA's] text" (*cf. Mertens, supra*, 113 S. Ct. at 2071) or to support the recognition of any remedy by inference; rather, in this case, the common law of trusts and the declared purpose of the statute serve only to explain why Congress would have intended that § 502(a)(3) be construed exactly as it is written.

The statutory construction arguments of petitioner and its *amici* focus almost exclusively on the significance of § 409 of ERISA, 29 U.S.C. § 1109 (1988), and its authorization of breach of fiduciary duty recovery "to the plan."

Much emphasis is placed on the secondary principle of statutory construction that a provision specifically addressing an issue should be deemed to control over another addressing it in more general language. This argument proceeds from the erroneous premise that § 409, as made actionable through § 502(a)(2) of ERISA, 29 U.S.C. § 1132(a)(2) (1988), is somehow in conflict with § 502(a)(3). However, there is no inherent conflict between the availability of recovery to the plan under §§ 409 and 502(a)(2) and the availability of appropriate equitable relief for breach of fiduciary duty to individual participants and beneficiaries under § 502(a)(3). Those remedies may properly be viewed as complementary, particularly in light of the fundamental purpose of ERISA. While giving effect to the plain language of § 502(a)(3) may result in some duplication of the remedies available to the plan under § 409 and § 502(a)(2), contrary to petitioner's argument the failure to recognize a right of individual recovery plainly would violate the principle that a statute should be construed so as to give effect to all of its provisions. Nothing in the court of appeals' construction of § 502(a)(3) would impinge upon the continued enforcement of § 409 for recovery to the plan under § 502(a)(2), but to construe § 409 as the exclusive source of a remedy for breach of fiduciary duty clearly would read out of § 502(a)(3) a critical feature of its plain meaning.

Petitioner also asserts that the legislative history of ERISA "confirms that the remedies ultimately placed in ERISA § 409 were intended to cover all actions for breach of fiduciary duty." (Petitioner's brief at 26.) As a threshold matter, where the language of a statute is clear, any

argument based on legislative history is of minimal, if any, relevance. *Metropolitan Stevedore Co. v. Rambo*, 115 S. Ct. 2144, 2149 (1995); *Curtiss-Wright Corp. v. Schoonejongen*, 115 S. Ct. 1223, 1229-30 (1995).

The legislative history of ERISA does not support petitioner's argument in any event. In particular, petitioner's assertion that § 502(a)(3) appeared relatively late in the legislative process (while § 409 was included in the first bill introduced) is unfounded. Each of the bills cited by petitioner, in fact, contained an antecedent of § 502(a)(3) to accompany the antecedent of § 409. *See* H.R. 2 (as introduced), 93d Cong., 1st Sess. § 106 (1973), *reprinted in* Leg. Hist. 3, 33 (Secretary may sue to enjoin violation of title); S. 4 (as introduced), 93d Cong., 1st Sess. § 603 (1973), *reprinted in* Leg. Hist. 93, 183 (participant or beneficiary may sue "for appropriate relief, legal or equitable, to redress or restrain a breach of any . . . duty of a fiduciary"); S. 1557, 93d Cong., 1st Sess. § 9 (1973) *reprinted in* Leg. Hist. 280, 303 (participant or beneficiary may sue "for appropriate relief, legal or equitable, to redress a breach of any . . . duty of a fiduciary"); S. 4 (as reported), 93d Cong., 1st Sess., § 603 (1973), *reprinted in* Leg. Hist. 389, 579 (participant or beneficiary may sue "for appropriate relief, legal or equitable to redress or restrain a breach of any . . . duty of a fiduciary"). Although the precise contours of the provision were altered in the legislative process and emerged as the language seen in § 502(a)(3), petitioner's suggestions that this provision was appended to ERISA by the Conference Committee as something of an afterthought, or only to

allow enforcement of ERISA's lesser "regulatory provisions," simply are not supported by the legislative history.

The legislative history of ERISA does establish some principles which have a bearing on the proper construction of § 502(a)(3). For example, as the Court has noted, the legislative history establishes that Congress intended to codify in ERISA principles of the common law of trusts, which in turn has led the Court to seek guidance in the common law in interpreting the statute. *See* H.R. Rep. No. 93-533, p. 11 (1973), *reprinted in* Leg. Hist. 2348, 2358 ("The fiduciary responsibility section, in essence, codifies and makes applicable to . . . fiduciaries certain principles developed in the evolution of the law of trusts"), *quoted in Firestone, supra,* 489 U.S. at 110.

The legislative history also is replete with statements reflecting Congressional intent that individual participants and beneficiaries would have the right to bring actions to redress violations of the statute – including its fiduciary duty provisions. *See, e.g., Joint Explanatory Statement of the Committee of Conference,* 120 Cong. Rec. 27,934 (1974), *reprinted in* Leg. Hist. 4519, 4594 ("Under the conference agreement, civil actions may be brought by a participant or beneficiary . . . for relief from breach of fiduciary responsibility"); 120 Cong. Rec. 29,933 (1974), *reprinted in* Leg. Hist. at 4745 ("Individual participants and beneficiaries will . . . be able to bring suit . . . to obtain redress of fiduciary violations") (statement of Sen. Williams); 120 Cong. Rec. 29,935 (1974), *reprinted in* Leg. Hist. at 4752 ("Employees would have the right to enforce new Federal rules of conduct applicable to those who manage pension and welfare funds") (statement of Sen.

Javits); H.R. Rep. No. 93-533, p. 17 (1973), *reprinted in* Leg. Hist. 2348, 2364 ("The enforcement provisions have been designed specifically to provide . . . participants and beneficiaries with broad remedies for redressing or preventing violations of the Act").

However, petitioner does not cite, and respondents have not found, anything in the legislative history which directly addresses the specific question of whether participants and beneficiaries were intended to have a right of individual recovery for breach of fiduciary duty. *Cf. United States v. Ron Pair Enterprises,* 489 U.S. 235, 240 (1989) ("it is not appropriate or realistic to expect Congress to have explained with particularity each step it took" in enacting sweeping legislation). In the face of such inconclusive legislative history, a court must return to the first premise of statutory construction – giving effect to the plain meaning of the words used by Congress. *Id.; Hubbard v. United States,* 115 S. Ct. 1754, 1761 (1995). That principle alone is more than sufficient to delineate the proper construction of § 502(a)(3).

Finally, a few comments are in order regarding some of the policy arguments raised by one of petitioner's *amici,* the Chamber of Commerce, as to the perceived consequences of recognizing a right of individual recovery for breach of fiduciary duty. The Chamber's brief suggests that one result of such recognition would be that breach of fiduciary duty claims would routinely be joined with run-of-the-mill benefit claims already cognizable under § 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B) (1988). Section 404(a)(1) provides that one of the obligations of a fiduciary is to discharge his duties "in accordance with the documents and instruments governing the

plan." A failure to pay benefits owing under the terms of the plan therefore would also constitute a breach of fiduciary duty. Of course, that would be so regardless of whether § 502(a)(3) is construed as authorizing a right of *individual recovery* for a breach of the duties set forth in § 404(a)(1). Moreover, even if the Chamber's concern that the joinder of an alternative theory of recovery for the same conduct would significantly increase the cost of benefit litigation were well founded (which is subject to debate), this is the sort of policy concern better addressed to Congress in the first instance, and certainly is not sufficient to carry the "exceptionally heavy burden" of overcoming the plain language of § 502(a)(3).

The same is true of the Chamber's argument that recognition of a right of individual recovery for breach of fiduciary duty would create incompatible legal standards for courts hearing benefit claim disputes. Under *Firestone*, when the plan documents confer discretion upon a fiduciary, the fiduciary's claim denial decision may be overturned only for an abuse of discretion. The Chamber reasons that if an individual beneficiary has a right of recovery under § 502(a)(3), an inconsistent standard of review would be compelled because under § 404(a)(1) a fiduciary must discharge its duties "solely in the interest of the participants and beneficiaries." This argument again confuses the recognition of a right of *individual recovery* under § 502(a)(3) with the *existence of the duty* under § 404(a)(1) in the first instance. Even if the plain language of § 502(a)(3) did not provide for individual relief for breach of fiduciary duty, the fiduciary duty itself already undeniably exists under § 404(a)(1). This Court obviously was aware of the duties imposed by § 404(a)(1) when it decided the

Firestone case, and it did not regard the abuse of discretion standard (when appropriately authorized by the plan documents) as being incompatible with the fulfillment of those duties. Moreover, the abuse of discretion standard endorsed in *Firestone* itself was drawn directly from the common law of trusts (*see* 489 U.S. at 111) - - under which fiduciaries had the duty of loyalty now codified in § 404(a)(1), and under which they also were subject to liability to individual beneficiaries. Accordingly, the argument that giving effect to the plain meaning of § 502(a)(3) will create inconsistent standards of review for benefit litigation simply will not withstand scrutiny.

If anything, the policy arguments of petitioner and its *amici* serve to demonstrate the very incongruity of their position. On the one hand, they cannot deny that under § 404(a)(1) fiduciaries must discharge their duties prudently and "solely in the interest of the participants and beneficiaries," yet on the other they maintain that the breach of a fiduciary duty which causes injury not to the plan but only to an individual participant or beneficiary should not be remediable. To so hold in this case, as the court of appeals stated, "would leave unremedied an egregious wrong." (PA 16a.) That Congress could have intended such a result is inconceivable; that it did not intend such a result is evident from the plain language of § 502(a)(3).

II. PETITIONER BREACHED ITS FIDUCIARY DUTY NOT TO LIE TO PARTICIPANTS ABOUT BENEFITS.

Petitioner's argument on the second question presented in this certiorari proceeding at times strays so far from the genuine issues that its relation to this case is difficult to discern. Notwithstanding petitioner's consistent effort to characterize it as such, this is *not* a case about whether an ERISA fiduciary has a duty to disclose facts to beneficiaries beyond the specific mandatory disclosures enumerated in the statute. Rather, this case raises the question of whether, when an ERISA fiduciary exercises its discretion to communicate with beneficiaries about the status of their benefits, it has a duty to be honest in such communications. The unchallenged record in this case establishes that petitioner was not merely silent in the face of a duty to disclose, but rather that petitioner made *intentional, affirmative misrepresentations* to participants about the status and security of their benefits.[9]

[9] Petitioner's unwillingness to acknowledge the facts which have been conclusively established at this stage of the proceedings is particularly evident in this section of its argument. Petitioner suggests that the record reflects only "*claimed* wrongs" and that it "*allegedly* did not fully inform plaintiffs as to the likely future financial viability of MCC." (Petitioner's brief at 29, 32; emphasis added.) The distinction between "claimed wrongs" or "allegations" and unchallenged factual findings of fraudulent misrepresentation may elude petitioner, but it surely will not elude this Court.

Petitioner is intent upon characterizing its conduct as a failure to disclose rather than as affirmative misrepresentations because on the surface of the matter a "mere" failure to disclose would seem to fit better with petitioner's theory that it did not act in a fiduciary capacity, but rather only engaged in "business decisions" in its nonfiduciary capacity as an employer. Petitioner argues that if an employer which also serves as an ERISA fiduciary does not act in a fiduciary capacity when it makes business decisions regarding a plan, then its conduct does not take on a fiduciary character merely because, in the alleged absence of a duty to disclose, it elects not to communicate with plan participants about those decisions other than as expressly required by ERISA's reporting and disclosure scheme.

Petitioner's argument is fatally flawed in several respects, beginning, as noted above, with the fact that this case does not involve a mere failure to disclose facts relating to an employer's plan-related business decisions. Whether or not a fiduciary has a duty to communicate facts in the first instance, the relevant authorities consistently reflect that once it exercises its discretion to communicate about benefits (as petitioner did in this case), it enters into the realm of fiduciary responsibility and is subject to all of the attendant fiduciary duties.

The distinction between a mere business decision relating to a plan and the fiduciary function of communication to beneficiaries about the status of the plan is clearly reflected in the court of appeals' decision in this case (PA 12a-13a), as well as in the decisions of other courts of appeals. In *Berlin v. Michigan Bell Telephone Co.*, 858 F.2d 1154 (6th Cir. 1988), the court recognized that

"purely business decisions by an ERISA employer are not governed by section [404(a)(1)'s] fiduciary standards," but that an employer acting as plan administrator has a fiduciary duty not to make material misrepresentations to participants about its decisions with respect to the plan. *Id.*, 858 F.2d at 1163-64.

Decisions of the court of appeals for the Third Circuit also effectively illustrate the distinction between mere business decisions and the fiduciary act of communicating with beneficiaries. In *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155 (3d Cir. 1990) (a case frequently cited by petitioner – see petitioner's brief at 31, 32, 33 and 35), the court held that an employer's decision to amend or terminate an employee benefit plan is "unconstrained by the fiduciary duties that ERISA imposes upon plan administration." *Id.*, 908 F.2d at 1162. However, *Hozier* did not involve allegations of misleading communications about the status of benefits. In four subsequent decisions, the Third Circuit made it clear that ERISA's fiduciary duties do apply when an employer communicates with plan participants about benefits. *See In Re: Unisys Corp. Retiree Medical Benefit "ERISA" Litigation*, No. 94-1875, 1995 WL 380983 (3d Cir. June 28, 1995); *Curcio v. John Hancock Mutual Life Insurance Co.*, 33 F.3d 226, 232-35 (3d Cir. 1994); *Bixler v. Central Pennsylvania Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1300 (3d Cir. 1993); *Fischer v. Philadelphia Electric Co.*, 994 F.2d 130, 133-35 (3d Cir.), *cert. denied*, 114 S. Ct. 622 (1993). In the *Unisys* opinion, the court (citing *Hozier* as supporting authority) clearly articulated the principle at hand:

> When a corporate plan administrator speaks about benefits to its employees, the administrator acts in a fiduciary capacity even if he speaks about a nonfiduciary decision such as the business decision to terminate a welfare benefit plan.

Id. at *10, n. 10.

The fact that *communication* about benefits inherently is a fiduciary function is confirmed by the structure of ERISA. The role of a plan administrator within the framework of ERISA inherently is fiduciary in nature. The definition of a "fiduciary" expressly includes anyone who exercises *any* discretionary authority or discretionary responsibility *in the administration of a plan*. § 3(21)(A) of ERISA, 29 U.S.C. § 1002(21)(A) (1988) (emphasis added). Section 402(a)(1) of ERISA, 29 U.S.C. § 1102(a)(1) (1988), requires that the instrument establishing a plan shall provide for one or more "named fiduciaries" who "shall have authority to control and manage the . . . *administration* of the plan." (Emphasis added.) The advisory regulations published by the Department of Labor also state that "a plan administrator . . . must, b[y] the very nature of his position, have discretionary authority or discretionary responsibility in the administration of the plan within the meaning of § 3(21)(A)(iii) of the Act. Persons who hold such positions will therefore be fiduciaries." 29 C.F.R. § 2509.75-8 D-3 (1988).

The primary responsibility assigned to the fiduciary position of plan administrator under ERISA is *to communicate with participants and beneficiaries about the nature and status of their benefits*. It is the plan administrator, as such, who bears the responsibility for compliance with ERISA's

reporting and disclosure requirements. *See* §§ 101-104 of ERISA, 29 U.S.C. §§ 1021-1024 (1988 & Supp. 1993). The structure of ERISA itself thus indicates that the act of communicating with beneficiaries about the status of their benefits inherently is a fiduciary function, at least to the extent that any discretion is exercised in that process.

Petitioner apparently contends, however, that ERISA's reporting and disclosure obligations are exclusive in the sense that only in carrying out those specified disclosures could an employer be deemed to act in its fiduciary capacity as plan administrator. Any other benefit-related communications, petitioner would argue, cannot be deemed to be made in a fiduciary capacity because the making of any other communications is not required of the plan administrator/fiduciary by ERISA. As a threshold matter, this argument ignores the concept that one acts as a fiduciary when exercising *discretionary* authority or responsibility with regard to the administration of a plan. If anything, then, the fiduciary character of plan-related communications which the fiduciary *voluntarily elects* to make – an exercise of discretion – may be regarded as even more clearly a fiduciary function than the communications expressly required by ERISA.

The notion that ERISA's fiduciary duties do not extend to communications between fiduciaries and beneficiaries other than those communications specifically required in the reporting and disclosure provisions is patently untenable in any event. It is apparent from the typical complexity of employee benefit plans themselves and the continuously interactive nature of plan administration that discretionary communications between participants and fiduciaries (including employers acting in

the capacity of plan administrator) must occur on a regular basis in the course of plan administration.

This point is illustrated quite simply by the requirement of ERISA that an SPD include the name and address not only of the plan administrator but of all other fiduciaries of the plan. *See* § 102(b) of ERISA, 29 U.S.C. § 1022(b) (1988). The obvious purpose of including fiduciaries' names and addresses is to enable participants to communicate with the fiduciaries in some fashion. While the requirement of stating the name and address of the plan administrator might be explained in part by the fact that beneficiaries have the right, under ERISA's express disclosure provisions, to request or inspect certain documents through the plan administrator, the requirement of providing the names and addresses of other fiduciaries (upon whom the primary obligation to comply with express reporting and disclosure requirements is not imposed) can be explained only by the fact that other discretionary communications between beneficiaries and fiduciaries – to which ERISA's fiduciary duties would apply – were also contemplated by Congress. *See In Re: Unisys Corp. Retiree Medical Benefit "ERISA" Litigation*, No. 94-1875, 1995 WL 380983, at *6 (3d Cir. June 28, 1995) ("satisfaction by an employer as plan administrator of its statutory disclosure obligations under ERISA does not foreclose the possibility that the plan administrator may nonetheless breach its fiduciary duty owed to plan participants to communicate candidly if the plan administrator simultaneously or

subsequently makes material misrepresentations to those to whom the duties of loyalty and prudence are owed").[10]

It is apparent from the terms of petitioner's SPD, "You and Massey Ferguson," that petitioner itself plainly contemplated and indeed *invited* the regular occurrence of discretionary communications between participants and itself as plan administrator. In one passage in the SPD, petitioner stated that its designated group benefits administrators "are available to you or your survivors to assist and counsel as needed." (Pl. Ex. 114, section II, p. 7.) In another passage, petitioner encouraged beneficiaries to write or call the personnel administration office (which was designated to handle the day-to-day functions of plan administration) if they had "any questions concerning these benefits." (*Id.* at section VIII, p. 9.) Most importantly, in the section of the SPD describing participants' rights under ERISA, petitioner stated that "if you have any questions about your plan, you should contact the plan administrator." (*Id.* at section IX, pp. 4-5.)[11]

[10] *Curtiss-Wright v. Schoonejongen*, 115 S. Ct. 1223 (1995) is cited by petitioner in part for the proposition that ERISA's scheme "for enabling beneficiaries to learn their rights and obligations" is "built around reliance on the face of written plan documents." However, *Curtiss-Wright* certainly did not hold that no other form of communication about benefits was contemplated under ERISA, or that when such communications occur they would not also be subject to ERISA's fiduciary duty provision. *Curtiss-Wright* did not, in any event, involve a claim of breach of fiduciary duty or any allegation of affirmative misrepresentation regarding the status of benefits.

[11] Another section of the SPD entitled "Benefit Administrators" also highlights the distinction at issue in this case. It states, in pertinent part, as follows:

Petitioner's own SPD thus acknowledges not only that communications between participants and the plan administrator were contemplated in addition to those specified in ERISA's reporting and disclosure scheme, but also that the act of communicating with beneficiaries about the plan was regarded by petitioner itself as a function to be carried out in its fiduciary capacity as plan administrator.

The conclusion that the act of communicating with the plan participants about the plan or the status of benefits thereunder inherently is a fiduciary function is further supported by the common law of trusts, in which ERISA is rooted. At common law, a trustee is subject to stringent and broadly defined duties with regard to communications with beneficiaries about matters relating to the trust. *See, e.g., Restatement (Second) of Trusts*, §§ 170(2), 173 (1959).

A final note is in order about the threshold issue of whether the petitioner acted in its fiduciary capacity in making the affirmative misrepresentations which are at issue in this case. Although petitioner does not expressly

> Massey Ferguson, Inc. is the plan sponsor and administrator of the company's pension, savings, and welfare plans. The plan sponsor has *control* over the plans and the administrator is responsible for administering the plans.

(Pl. Ex. 114, section IX, p. 1.) This passage further illustrates the fact that while the employer may have control over decisions relating to the plan, the administration of the plan – which as shown elsewhere in the SPD includes communications with beneficiaries – is a function of the plan administrator. The latter is, in turn, inherently a fiduciary position.

raise the issue, there can be no legitimate doubt that its misrepresentations about MCC's financial health and outlook directly related to respondents' employee benefits. These and other intentional misrepresentations were made to implement Project Sunshine, which was specifically designed in part to rid petitioner of employee benefit obligations. The misrepresentations were made in the context of soliciting consent by the employees of the CARE division and retail stores to the transfer of their employment and benefit rights to MCC. In the case of a self-funded welfare benefit plan, the security of benefits is directly tied to the financial health of the employer/plan sponsor. If the employer is bankrupt, then there will be no source for the payment of any benefits. Thus, petitioner's fraudulent misrepresentations to the effect that MCC had a bright future went to the heart of the issue of the security of employee benefit rights for members of the Retired Class. As the district court found, the Retired Class relied to their detriment upon these and other affirmative misrepresentations in accepting the transfer of their employment and benefit rights to MCC.

Because petitioner was necessarily acting in its fiduciary capacity in communicating with employees about their benefits, the only remaining issue is the nature of the fiduciary duties attendant to such communications. Several courts which have considered the issue have held, drawing on the common law of trusts, that the fiduciary duties of loyalty and prudence imposed by § 404(a)(1) impose not only a *negative* duty not to misinform, but also an *affirmative* duty to inform when the fiduciary knows that its silence might be harmful to the

beneficiary. *See, e.g., Bixler v. Central Pennsylvania Teamsters Health and Welfare Fund*, 12 F.3d 1292, 1300 (3d Cir. 1993); *Anweiler v. American Electric Power Service Corp.*, 3 F.3d 986, 991-92 (7th Cir. 1993); *Eddy v. Colonial Life Insurance Co.*, 919 F.2d 747, 750-51 (D.C. Cir. 1990).

While the imposition of an affirmative duty of disclosure seems eminently reasonable and plainly consistent with the common law of trusts (*see Restatement (Second) of Trusts* §§ 170(2), 173 (1959)), the Court need not decide that issue here because, as noted above, this case involves affirmative misrepresentations and not mere silence or omissions. The authorities are uniform as to the existence of a fiduciary duty not to affirmatively misinform a beneficiary. *See, e.g., Mullins v. Pfizer, Inc.*, 23 F.3d 663, 668-69 (2nd Cir. 1994); *Fischer v. Philadelphia Electric Co.*, 994 F.2d 130, 133-35 (3d Cir.), *cert. denied*, 114 S. Ct. 622 (1993).[12] As succinctly stated by Judge Posner in *Peoria Union Stock Yards Co. v. Penn Mutual Life Insurance Co.*, 698 F.2d 320, 326 (7th Cir. 1983), "lying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in section 404(a)(1) of ERISA, 29 U.S.C.

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[12] A corollary of the duty not to make affirmative representations is the rule that affirmative representations are deemed fraudulent not only when they are patently false but when the maker knows they are misleading because of its failure to state additional or qualifying matter. *See Restatement (Second) of Torts*, § 529 (1977). This rule is distinct from the question of whether there is a duty to disclose in the first instance, i.e., whether mere silence can give rise to a cause of action for fraudulent breach of fiduciary duty. *Cf. Restatement (Second) of Torts*, § 551 (1977).

section 1104(a)(1)." The proposition hardly seems debatable, and petitioner cites no authority calling it into question.

There seems little need for resort to legislative history on a point of such clarity, but what little legislative history there is on the matter confirms the obvious – that ERISA was intended, in part, to prevent dishonesty in the administration of employee benefit plans. 120 Cong. Rec. 4780 (1974), *reprinted in* Leg. Hist. at 3590 (fiduciary standards were intended "to prevent abuses in the management of pension plan funds . . . and other unwise and dishonest financial dealings") (statement of Rep. Drinan); 120 Cong. Rec. 29,935 (1974), *reprinted in* Leg. Hist. at 4751 (ERISA was motivated by Congress's "sense of indignation and frustration over what often seemed to be a cynical disregard of fundamental American concepts of fairness and decency by some of those who managed the private pension funds") (statement of Sen. Javits); 120 Cong. Rec. 29,951 (1974), *reprinted in* Leg. Hist. at 4795 ("This bill will establish judicially enforceable standards to insure honest, faithful and competent management of pension and welfare funds") (statement of Sen. Bentsen).

As noted above, most of petitioner's argument on the question of whether its conduct constituted a breach of fiduciary duty dwells on matters which are really inapposite to that issue. Petitioner focuses in particular on the evidence as to its disclosure of a reserved right to amend or terminate the plan, and on the assertion that the court of appeals' decision in this case is somehow inconsistent with ERISA's vesting rules. Only a few comments are in order regarding those aspects of petitioner's argument.

Petitioner's focus upon the evidence regarding its disclosure of a reserved right to amend or terminate the plan is misplaced because among the unchallenged findings of the district court was the fact that petitioner has never acted to terminate the MF plan, or amended it in a way to eliminate welfare benefits. (PA 51a, ¶ 2.) Instead, petitioner fraudulently induced the employees of the CARE division and retail stores (including the respondents now identified as the Retired Class) to accept a transfer of their benefit rights from the MF plan to the MCC plan. This strategy was, of course, absolutely essential to petitioner's implementation of Project Sunshine, because it was necessary for the sham corporation to have employees in order to give the appearance of legitimacy to lenders (whose consent to the transfer of debt was required) and others. It would not have suited petitioner's purpose to simply terminate the plan (which also could have caused substantial disruption of its relationship with employees of other divisions whom it wished to retain) or to attempt to selectively amend it to exclude CARE division and retail store employees from its coverage. Whatever its motivation, the fact is that petitioner *did not exercise* a right of termination, and it cannot justify the achievement of its ends by saying it could have deprived respondents of their benefit rights by some theoretically permissible means other than the fraudulent means which it actually employed.

Petitioner's emphasis upon the reservation of a right to amend or terminate also is misplaced to the extent it relates to the argument that respondents cannot recover benefits under a breach of fiduciary theory which they could not recover under § 502(a)(1)(B). As noted in

respondents' statement of the case, respondents unsuccessfully sought to recover *lifetime* benefits under § 502(a)(1)(B) based on petitioner's failure to disclose in "You and Massey Ferguson" the reservation of the right to amend or terminate the plan. Respondents did not succeed on their claim for lifetime benefits because the district court concluded, and the court of appeals affirmed, that the reservation of rights in the plan itself was enforceable and that respondents' benefits therefore did not vest upon retirement. Only this claim of entitlement to lifetime benefits was litigated in the context of § 502(a)(1)(B). However, success on their breach of fiduciary duty claim nevertheless entitled respondents to be reinstated to the MF plan as though their transfer to MCC had not occurred. Thus, there is no logical inconsistency between the denial of recovery under § 502(a)(1)(B) (given the courts' conclusions) and the award of relief for breach of fiduciary duty.

Petitioner's focus upon the distinction between vesting rules applicable to pension and welfare plans is equally inapposite, and its argument that the court of appeals' decision "eviscerates" the distinction between pension and welfare plans in that regard is unfounded. The remedy for petitioner's breach of fiduciary duty, as modified by the court of appeals, simply was to reinstate respondents to the MF plan. Respondents have not been reinstated with vested or lifetime benefits. The court of appeals has clarified that respondents have only such rights as other members of the MF plan as it now exists, and petitioner's right to modify the plan still exists in accordance with the opinion. (PA 23a.) Accordingly, the court of appeals' decision simply does not impinge upon, let alone eviscerate, the distinction between pension plans and welfare plans with regard to vesting. Nor should anything in the result of this case serve to discourage employers from offering welfare benefits. The only thing it will, hopefully, serve to discourage them from doing is lying to their employees about the status of such benefits.

Finally, it is very important to note that petitioner's argument that it did not breach its fiduciary duty to respondents appears to address only the claim of the Retired Class. The claim of the Retired Class was based upon the fraudulent misrepresentations made to induce their consent to the transfer to MCC. The claims of the 10 individual respondents, however, are quite different. No misrepresentations were made to the individual respondents in connection with the transfer to MCC of petitioner's obligation to pay benefits to these respondents. Indeed, no disclosure of any kind was made. The 10 individual respondents already had retired from employment with petitioner at the time MCC was formed. Their consent to the transfer never was sought or obtained, and they learned of the transfer only after they stopped receiving benefits when MCC went into receivership. The court of appeals found that "such a complete disregard of the rights and interests of beneficiaries is a clear breach of fiduciary duty in violation of section [404(a)(1)]." (PA 17a.) Petitioner's conduct with respect to the individual respondents constituted a breach of the fiduciary duties of loyalty and prudence, as well as of the duty to administer the plan in accordance with the governing instruments. The latter is true simply because nothing in the plan documents authorized the "transfer" of petitioner's

benefit obligations to a retiree to another entity. Again, petitioner might in theory have attempted to achieve the same result by either amending or terminating the plan, but the fact is that it did not do so. While petitioner's argument on the right of individual recovery under § 502(a)(3) affects the individual respondents as well as the Retired Class, petitioner's argument as to whether it committed a breach of fiduciary duty does not appear to challenge the validity of the court of appeals' decision as it relates to the individual respondents. Petitioner in any event certainly has not identified any error in the holding as it relates to those respondents.

CONCLUSION

The decision of the court of appeals should be affirmed in its entirety.

Respectfully submitted,

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